TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 586 / 5

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, APPELLANT,

vs.

DOROTHEA T. FRANK

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 30, 1940.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 15, 1941.

[fol. 1]

IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, NINTH DISTRICT

DOROTHEA T. FRANK, Plaintiff,

against

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, Defendant

COMPLAINT

Plaintiff, by House, Grossman, Vorhaus & Hemley, her attorneys, complains of the defendant:

For a First Cause of Action

First. Plaintiff is a resident of the State of New York, residing in the Borough of Manhattan, New York City.

Second. Upon information and belief, defendant is a domestic corporation.

Third. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 261, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

[fol. 2] Fourth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Fifth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Sixth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Seventh. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Eighth. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Second Cause of Action

Ninth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second".

[fol. 3] Tenth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 1062, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Eleventh. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Twelfth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Thirteenth. Plaintiff is, and at and prior to the maturity of said coupons was, the lawful owner and holder thereof.

Fourteenth. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Fifteenth. By reason of the premises, there is now due and owing from the defendant to the plaintiff, the sum of [fol. 4] Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Third Cause of Action

Sixteenth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second".

Seventeenth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 1459, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Eighteenth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Nineteenth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obliga- [fol. 5] tions of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Twentieth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Twenty-First. The said coupon matured on April 1st, 1939 and payment thereof was demanded and refused.

Twenty-Second. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Fourth Cause of Action

Twenty-Third. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second."

Twenty-Fourth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to

its certain bond numbered 2354, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

[fol. 6] Twenty-fifth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Twenty-sixth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Twenty-seventh. Plaintiff is, and at and prior to the maturity of said coupon was, lawful owner and holder thereof.

Twenty-eighth. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Twenty-ninth. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Fifth Cause of Action

Thirtieth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the para-[fol. 7] graphs of this complaint designated "First" and "Second".

Thirty-first. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 2355, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Thirty-second. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value

received, guaranteed the punctual payment of the said coupon.

Thirty-third. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Thirty-fourth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Thirty-fifth. The said coupon matured on April 1st, 1939 and payment thereof was demanded and refused.

[fol. 8] Thirty-sixth. By reason of the premises, there is now due and owing from the defendant to the plaintiff, the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

Wherefore, plaintiff demands judgment against the defendant for the sum of One hundred and twenty-five and 00/100 ($125.00) Dollars, with interest thereon from the 1st day of April, 1939, together with the costs and disbursements of this action.

House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

Verified by Dorothea T. Frank on June 3rd, 1939.

[fol. 9] In Municipal Court of City of New York

Answer

The defendant, by Donovan, Leisure, Newton & Lumbard, its attorneys, answering the complaint herein:

First. Denies on information and belief each and every allegation contained in paragraphs of the complaint numbered and designated "Fourth", "Fifth", "Eighth", "Eleventh", "Twelfth", "Fifteenth", "Eighteenth", "Nineteenth", "Twenty-second", "Twenty-fifth", "Twenty-sixth", "Twenty-ninth", "Thirty-second", "Thirty-third" and "Thirty-sixth".

Second. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs of the complaint numbered and designated "First", "Sixth", "Seventh", "Thirteenth", "Fourteenth", "Twentieth", "Twenty-first", "Twenty-seventh", "Twenty-eighth", "Thirty-fourth", "Thirty-fifth" and in so much of the paragraphs of the complaint numbered and designated "Ninth", "Sixteenth", "Twenty-third" and "Thirtieth" as repeats and realleges the allegations contained in said paragraph "First".

And the defendant further alleges on information and belief:

[fol. 9a] For a First, Complete and Separate Defense to All Five Causes of Action

Third. That said The Lake Erie & Western Railroad Company referred to in paragraphs of the complaint numbered and designated "Fourth", "Fifth", "Eleventh", "Twelfth", "Eighteenth', "Nineteenth", "Twenty-fifth", "Twenty-sixth", "Thirty-second" and "Thirty-third" was an Illinois corporation organized on or about February 10, 1887, under and pursuant to the provisions of Chapter 114 of the Revised Statutes of Illinois, entitled "Railroads and Warehouses".

Fourth. That the alleged purported guaranties referred to in said paragraphs of the complaint are endorsed upon each of said bonds of The Northern Ohio Railway Company therein referred to and are in words and figures as follows:

"For value received, the Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the principal of the within bond at its maturity, and of the interest coupons hereto attached as they respectively become due in accordance with the terms, tenor and conditions thereof."

Fifth. That said alleged purported guaranties, if there were any such, were accommodation guaranties, and that said The Lake Erie & Western Railroad Company had no power, either under its charter or under the statutes under which it was incorporated, to make accommodation guaranties of the principal of and the interest coupons attached to said bonds.

[fol. 10] And for a Second, Complete, Separate and Distinct Defense to All Five Causes of Action

Sixth. That this defendant was formed as a consolidated corporation under and pursuant to the laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois on or about the 11th day of April, 1923.

Seventh. That said consolidation took place in accordance with the provisions of an Agreement and Articles of Consolidation, under date of December 28, 1922, by and between the former The New York, Chicago & St. Louis Railroad Company, the former The Chicago State Line Railroad Company, the former The Lake Erie & Western Railroad Company, the former Fort Wayne, Cincinnati & Louisville Railroad Company, and the former Toledo, St. Louis & Western Railroad Company.

Eighth. That this defendant was organized as aforesaid for the purpose of engaging in transportation by railroad subject to the Interstate Commerce Act.

Ninth. That thereafter, as required by Section 1 of the Interstate Commerce Act, this defendant was duly authorized by the Interstate Commerce Commission to and, pursuant to said authorization, did acquire and commence to operate the properties of its said constituent companies as [fol. 11] provided in said Agreement and Articles of Consolidation, and this defendant then became and ever since has been a common carrier by railroad subject to the Interstate Commerce Act.

Tenth. That the material portion of Section 20 a of the Interstate Commerce Act (41 Stat. 494, 49 U. S. C., Sec. 20-a) now provides and at all times since February 28, 1920, has provided as follows:

"Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier

to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption * * *''

[fol. 12] (7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.''

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commisison is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption * * *''

Eleventh. That this defendant has never been authorized by said Interstate Commerce Commission to assume or to agree to perform said alleged purported guarantees of the said The Lake Erie & Western Railroad Company, and this defendant has never assumed nor agreed to perform said alleged purported guaranties.

Wherefore, this defendant demands judgment dismissing the complaint with costs.

Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office & Post Office Address, No. 2 Wall Street, Borough of Manhattan, New York City.

[fol. 13] *Duly sworn to by David Teitelbaum. Jurat omitted in printing.*

[fol. 14] In Municipal Court of City of New York

Notice of Plaintiff's Motion for Summary Judgment

Sirs:

Please take notice that upon the pleadings herein, upon the admissions of facts made by defendant, pursuant to § 323 of the Civil Practice Act, by notice in writing, dated November — 1939, and upon the annexed affidavit of Dorothea T. Frank, sworn to the 22nd day of December, 1939, the plaintiff will move, at a Special Term of this Court, appointed to be held in Part 3 thereof, at the Central Motion Part, at No. 8 Reade Street, in the Borough of Manhattan, New York City, on the 9th day of January, 1940, at 1:30 P. M., or as soon thereafter as counsel can be heard, that pursuant to the provisions of Rule 113 of the Rules of Civil Practice the answer be stricken out and summary judgment entered in favor of the plaintiff and against the defendant as demanded in the complaint herein; and for such other or further relief in the premises as may be just.

Affidavits to be used in answering this motion must be served at least five (5) days before the hearing.

[fol. 15] Dated: New York, December 30th, 1939.

Yours, etc., House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, No. 521 Fifth Avenue, New York, N. Y.

To: Donovan, Leisure, Newton & Lumbard, Esqs., Attorneys for Defendant, No. 2 Wall Street, New York, N. Y.

[fol 16] In Municipal Court of City of New York

Affidavit of Dorothea T. Frank in Support of Plaintiff's Motion for Summary Judgment

State of New York,
County of New York, ss:

Dorothea T. Frank, being duly sworn, deposes and says:

I am the plaintiff herein. I am and at and prior to the commencement of this action was a resident of the City, County and State of New York. I reside at No. 24 West

90th Street, in the Borough of Manhattan, City of New York.

I am and at and prior to the commencement of this action was the owner of the five bonds mentioned in the complaint herein, to wit,—First Mortgage Five Percent Gold Bonds of The Northern Ohio Railway Company, for the face amount of One Thousand ($1,000) Dollars each, numbered, respectively, 261, 1062, 1459, 2354 and 2355, dated October 1, 1895, and due October 1, 1945, and also of the several interest coupons attached thereto described in the complaint, each of said coupons being numbered 87, each for the sum of Twenty-five ($25) Dollars, payable April [fol. 17] 1, 1939.

Each of said bonds bears this endorsement:

"Guarantee

For value received, The Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the within bond at its maturity, and of the interest coupons hereto attached, as they consecutively become due, in accordance with the terms, tenor and conditions thereof.

The Lake Erie and Western Railroad Company, By L. M. Schwan, V. President.

Attest: Sam Shortridge, Secretary. (Seal of The Lake Erie and Western Railroad Company)."

The said bonds, together with the said coupons and all subsequently maturing coupons thereto attached, will be produced upon the hearing of this motion.

I purchased these bonds on the open market, through a firm of brokers, on the 31st day of July, 1936, and paid therefor the sum of $750 each, with accrued unpaid interest. I bought them as an investment, without notice of any defense thereto or to the guarantee thereof. All coupons at that time unmatured were attached thereto.

In response to a demand made, pursuant to the provisions of § 323 of the Civil Practice Act, defendant has by written notice admitted, for the purpose of this cause only, [fol. 18] certain specific facts. Such admissions will be submitted herewith.

It appears from the answer herein and from such admissions that defendant is a consolidated corporation, formed under and pursuant to the laws of the States of New York,

Pennsylvania, Ohio, Indiana and Illinois on or about April 11th, 1923, pursuant to an agreement of consolidation, dated December 28th, 1922. It further appears from such admissions that the former The New York, Chicago & St. Louis Railroad Company, one of the constituents of said consolidated corporation, was at the time of the consolidation a corporation organized under the laws of New York, Pennsylvania, Ohio and Indiana, and from the answer and admissions that the former The Lake Erie & Western Railroad Company, another constituent of said consolidated corporation, was at that time and at the time of the endorsement of its guaranties above mentioned a corporation organized under the laws of the State of Illinois.

I am advised that by applicable statutes the liabilities incurred prior to consolidation by any of the constituent corporations attach after consolidation to such new corporation and are enforcible against it.

No part of the sum payable on any of the coupons described in the complaint has been paid and there is now [fol. 19] due and owing to me upon each of said five coupons the sum of Twenty-five ($25) Dollars, making in all One Hundred and Twenty-five ($125) Dollars, with interest thereon from April 1, 1939, for which amount, with interest, judgment is demanded in the complaint herein.

The second defense alleges in substance that the Defendant, an interstate carrier, was never authorized by the Interstate Commerce Commission to assume or to agree to perform the guaranties.

I have been advised by my attorneys that the provisions of § 20 (a) of the Interstate Commerce Act, to which reference is made in the second defense, have no application whatsoever to the liabilities of constituent companies which, by virtue of statutory provisions, attach upon consolidation to the new corporation and that as a matter of law the second defense is untenable.

I verily believe there is no defense to the action.

Dorothea T. Frank.

Verified December 22, 1939.

[fol. 20] In Municipal Court of City of New York

Admissions of Defendant

Sirs:

Please Take Notice that in response to the plaintiff's demand, pursuant to Section 323 of the Civil Practice Act, the defendant, for the purpose of this cause only, and without conceding the materiality of all or any of the matters referred to in said demand or in this response thereto:

1. Admits that on or about October 1, 1895, the Northern Ohio Railway Company was the owner of a line of railway extending from Main Street in Akron to Delphos in the State of Ohio.

2. Admits that on or about October 1, 1895, said The Northern Ohio Railway Company made, executed and delivered a certain indenture of mortgage to Central Trust Company of New York, bearing date on said day, to secure an issue of 4,000 bonds, in the face amount of $1,000 each, designated First Mortgage 5% Gold Bonds and covering said railroad of the mortgagor.

3. Admits that of said issue, bonds numbered respectively, 1 to 2500 inclusive, were to be and were then issued, [fol. 21] and the remaining bonds numbered 2501 to 4000 were reserved to be issued in connection with possible future construction of extensions to the mortgagor's line of railway.

4. Admits that Lake Erie & Western Railroad Company was organized as a corporation on or about February 1, 1887, under and pursuant to Chapter 114 of the Revised Statutes of the State of Illinois, entitled "Railroads and Warehouses", and the said The Lake Erie & Western Railroad Company was engaged in the operation of a line of railway for many years before and since October 1, 1895.

5. Admits that on or about October 1, 1895 an indenture of lease of the said line of railway of The Northern Ohio Railway Company was executed and delivered by and between The Northern Ohio Railway Company as lessor and The Lake Erie & Western Railroad Company, as lessee, and that thereupon said The Lake Erie & Western Railroad Company took possession of the said line of railway.

A copy of said indenture marked Exhibit "A" is annexed hereto and made a part hereof.

6. Admits that at or about the time of the making of said indenture of lease there was endorsed upon each of said bonds numbered from 1 to 2500 inclusive, by the Vice-President and Secretary of The Lake Erie & Western Railroad [fol. 22] Company, the words and figures following:

"Guarantee

For value received, The Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the within bond at its maturity, and of the interest coupons hereto attached, as they consecutively become due, in accordance with the terms, tenor and conditions thereof.

The Lake Erie and Western Railroad Company. By L. M. Schwan, V. President.

Attest: Sam Shortridge, Secretary. (Seal of The Lake Erie and Western Railroad Company)."

and that said officers affixed to each of said endorsements the corporate seal of The Lake Erie & Western Railroad Company.

7. Admits that this defendant was formed as a consolidated corporation under and pursuant to the laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois on or about the 11th day of April, 1923. Admits that said consolidation took place in accordance with the provisions of an agreement and articles of Consolidation under date of December 28, 1922, by and between the former The New York, Chicago & St. Louis Railroad Company, the former The Chicago State Line Railroad Company, the former The Lake Erie & Western Railroad Company, the former Fort Wayne, Cincinnati & Louisville Railroad Company, and the former Toledo, St. Louis & Western Railroad Company. Admits that the former The New York, Chicago & St. Louis Railroad Company was, at the time of the making of said agreement, a corporation or- [fol. 23] ganized under the laws of the States of New York, Pennsylvania, Ohio and Indiana, the former The Chicago State Line Railroad Company, a corporation organized under the laws of the State of Illinois, the former The Lake Erie & Western Railroad Company, a corporation organ-

ized under the laws of the State of Illinois, the former Fort Wayne, Cincinnati & Louisville Railroad Company, a corporation organized under the laws of the State of Indiana, and the former Toledo, St. Louis & Western Railroad Company, a corporation organized under the laws of the State of Indiana.

8. Admits that thereafter this defendant was duly authorized by the Interstate Commerce Commission to and, pursuant to said authorization did, acquire and commence to operate the properties of its said constituent companies as provided in said agreement and Articles of Consolidation.

9. Admits that this defendant was duly authorized by the Interstate Commerce Commission and, pursuant to said authorization did issue its own capital stock in exchange for the capital stock of said constituent companies as provided in said agreement and Articles of Consolidation.

Except as hereinbefore expressly admitted, this defendant declines to admit any of the matters stated in any of the items contained in plaintiff's said demand, nor does the defendant by any admission herein made, admit that [fol. 24] it was ever authorized by the Interstate Commerce Commission to assume any obligation or liability in respect of the said bonds of The Northern Ohio Railway Company referred to in item 12 of plaintiff's said demand, nor that it has ever assumed any obligation or liability in respect of said bonds.

Yours, etc., Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant. Office and P. O. Address, No. 2 Wall Street, Borough of Manhattan, New York, N. Y.

Dated, N. Y., November —, 1939.

To: House, Grossman, Vorhaus & Hemley, Esqs., Attorneys for Plaintiff. Office & P. O. Address, No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 25] In Municipal Court of City of New York

Notice of Defendant's Cross-Motion for Summary Judgment

Sirs:

Please Take Notice that on the annexed affidavits of H. F. Lohmeyer, G. A. Wallis, C. C. Collister, Harry W. Sturges, Jr., and Theodore Sherwood Hope, Jr., sworn to the 19th day of January, 1940, the 19th day of January, 1940, the 19th day of January, 1940, the 20th day of January, 1940 and the 20th day of January, 1940, respectively, and on the complaint herein, verified the 3rd day of June, 1939, and on the answer of the defendant herein, verified the 31st day of July, 1939, and on the papers submitted by the plaintiff on her motion for summary judgment herein, and on all the pleadings herein, and all the proceedings heretofore had herein, the undersigned will move this Court, by way of cross-motion to plaintiff's said motion for summary judgment, at the same time and place plaintiff's said motion is now returnable, i. e. at a Special Term, Part III of the Central Motion Part of this Court, to be held at No. 8 Reade Street, in the Borough of Manhattan, City and State of New York, on the 24th day of January, 1940, at 1:30 o'clock in the afternoon of that day, or as soon thereafter as counsel [fol. 26] can be heard, for an order pursuant to Rule 113 of the Rules of Civil Practice, dismissing the complaint herein and directing the entry of judgment in favor of the defendant, on the ground that this action has no merit, and for such other, further and different relief as to the Court may seem just, together with the costs of this motion.

Yours, &c. Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office & Post Office Address, 2 Wall Street, Borough of Manhattan, New York, N. Y.

Dated: New York, January 20, 1940.

To: House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, Office and P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 27] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of New York,
County of New York, ss:

Theodore Sherwood Hope, Jr., being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York, am associated with the firm of Donovan, Leisure, Newton & Lumbard, the attorneys for the defendant in the above entitled action, and make this affidavit on behalf of said defendant in support of its motion for summary judgment and in opposition to the cross-motion of the plaintiff for summary judgment.

2. The issues under the pleadings: This action is brought by the plaintiff upon an alleged guaranty by the former The Lake Erie & Western Railroad Company (hereinafter called the "L. E. & W.") of principal and interest of certain bonds issued by the Northern Ohio Railway Company (hereinafter called the "Northern Ohio") and alleged to be now held by the plaintiff. The defendant was formed as a consolidated corporation by a consolidation of the L. E. & W. with a number of other railroad corporations and is alleged to have assumed by said consolidation an obligation in respect of these bonds as guarantor thereof.

[fol. 28] The plaintiff's cause of action thus consists of three main elements:

(1) The plaintiff's alleged ownership of the bonds in question and their appurtenant coupons.

In view of the statements and undertakings contained in plaintiff's affidavits, it seems that no issue of fact or law will be presented with respect to this element of her case.

(2) The alleged guaranty by the L. E. & W.

The defendant's answer denies that this alleged guaranty was the act of the L. E. & W. and pleads affirmatively as its First Defense that it was ultra vires that corporation, under its charter and the laws of the State of Illinois under which it was organized. It is not denied that the alleged guaranty was endorsed on the Northern Ohio bonds by officers of the

L. E. & W. under the purported authority of a resolution of its Board of Directors. However, the power of the L. E. & W. to make the alleged guaranty and thus, their authority to cause it to make the same, are denied. The issues presented by this defense are issues of fact.

(3) The defendant's alleged assumption, under Section 143 of the New York Railroad Law, of the L. E. & W.'s alleged obligation as guarantor of the Nor'hern Ohio bonds.

The defendant was formed as a consolidated corporation [fol. 29] having the L. E. & W. as one of its constituents. Section 143 of the Railroad Law provides that such a consolidated corporation, by its formation, assumes the liabilities of its constituents. The defendant's answer pleads affirmatively as its Second Defense that it never applied for nor received authorization from the Interstate Commerce Commission, as required by Section 20(a) of the Interstate Commerce Act, to assume any obligation in respect of the Northern Ohio bonds, as guarantor or otherwise. The facts as to this defense are not in dispute and the only issue presented thereby is an issue of law.

3. The defendant's cross-motion for summary judgment:

The defendant's cross-motion for summary judgment is based solely on the second defense set out in its answer, which has just been described. In deference to the rule that questions of implied corporate power will not ordinarily be determined on motion for summary judgment, defendant's cross-motion is not based on its first defense of ultra vires. Section 20(a) of the Interstate Commerce Act expressly provides:

"(1) *Carrier defined.* As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter.

[fol. 30] "(2) *Issuance of securities; assumption of obligations; authorization.* It shall be unlawful for any carrier * * * to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect

of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses * * * of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such * * * assumption * * *"

And provides further:

"(11) *Securities issued contrary to law void; effect; penalty.* "Any * * * obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if * * * assumed without such authorization therefore having first been obtained * * *"

The defendant was organized as a railroad corporation, for the purpose of engaging in and is engaged in interstate commerce, and thus was, is and always has been a "carrier" as defined in said Section 20(a).

It appears from the affidavits of H. F. Lohmeyer and C. C. Collister, submitted herewith, and from the letter of the Secretary of the Interstate Commerce Commission, hereafter set forth, that the defendant never applied for nor received authorization from the Interstate Commerce Commission under Section 20(a) of the Interstate Commerce Act to assume any liability or obligation, as lessor, lessee, guarantor, surety, or otherwise, in respect of bonds of the [fol. 31] Northern Ohio Railway Company.

Said letter was written in response to my written inquiry and was in words and figures as follows:[1]

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[1] Except for such passage commencing on page 5 thereof, the Commission's report of November 10, 1939, referred to in the second paragraph of said letter, has no possible bearing on the present controversy, but deals merely with the amount of compensation to be paid to various persons and their counsel in connection with the reorganization of the Northern Ohio Railway Company. Your deponent does not believe that said passage is material, but for the sake of

[fol. 32] "INTERSTATE COMMERCE COMMISSION

Office of the Secretary

Washington

W. P. Bartel, Secretary

November 25, 1939.
File No. 697715

Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.

GENTLEMEN:

In response to your letter of November 22, you are advised that the New York, Chicago & St. Louis Railroad Company has never applied for, nor received authorization pursuant to section 20 (a) of the Interstate Commerce Act to assume any obligation or liability as lessor, lessee, guarantor, endorser, surety, or otherwise in respect of bonds of the Northern Ohio Railway Company.

For further information I would refer you to the discussion beginning at page 5 in the Commission's report of November 10, 1939, in Finance Docket No. 9923, Akron,

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completeness, sets the same out below. Said passage reads as follows:

"The $2,500,000 first-mortgage bonds of the Northern Ohio are guaranteed as to principal and interest not only by the Akron but also by the Lake Erie & Western Railroad Company, hereinafter called the Lake Erie, a predecessor lessee of the property of the Northern Ohio. The Lake Erie was consolidated with the New York, Chicago & St. Louis Railroad Company, hereinafter called the Nickel Plate, which never expressly agreed to assume the liability on the Lake Erie guaranty. That the consolidation had the effect of transferring the guaranty of the Lake Erie to the Nickel Plate appears to be generally assumed by the parties to the reorganization proceeding, but counsel for the Northern Ohio committee asserts that this constituted a fundamental legal question. However, the Akron, when it took the assignment of the lease from the Lake Erie in 1919, agreed to hold the Lake Erie harmless in regard to its guaranty of the principal and interest of the Northern Ohio's bonds, which agreement would inure to the benefit of the Nickel Plate.

This situation created a problem peculiar to the interests

Canton & Youngstown Railway Company and Northern Ohio Railway Company Reorganization, copy of which is enclosed. If you desire to have the report and order certified kindly return the enclosed copy, together with your remittance of 50 cents to cover the cost of certification. Information concerning payment of charges is set forth in the enclosed memorandum.

Respectfully, (Signed) W. P. Bartel, Secretary."

[fol. 33] The reason your deponent sets out said letter in this affidavit instead of furnishing a certificate of the Interstate Commerce Commission, setting out the facts stated in said letter, is that the Secretary of the Intersate Commerce Commission takes the position that he is not authorized to make such certificate.

This defense thus presents no question of fact.

It is not open to dispute that the defendant was, is and always has been a "carrier".

It is not open to dispute that the defendant never applied for nor received I. C. C. authorization to assume any obligation, as guarantor or otherwise, in respect of any Northern Ohio bonds.

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of the Northern Ohio committee which it and its counsel early attempted to solve. Counsel took preliminary steps to enforce the guaranty by legal proceedings and in that connection employed the firm of Smith, Remster, Hornbrook & Smith, of Indianapolis, Ind., that State having been selected as the proper forum in which to bring suit against the Nickel Plate. That firm devoted a substantial part of some seven weeks to a study of the problems presented in preparation for institution and prosecution of a suit. Before the suit was filed, negotiations were had with representatives of the Nickel Plate which resulted in the latter's agreement, through a nominee, to purchase the Northern Ohio bond coupons maturing from April 1, 1933, to April 1, 1938, inclusive. Subsequently, the debtors' trustees paid the first four of the eleven maturities, thus leaving the Nickel Plate the owner of the seven remaining maturities ending April 1, 1938. The contemplated suit was indefinitely deferred, but negotiations with the Nickel Plate looking to final settlement with the Northern Ohio bondholders are still in progress."

The only issue presented by this defense is a pure issue of law.

Although, as appears from the annexed affidavit of C. C. Collister, the defendant never expressly assumed said alleged guaranty of the Lake Erie & Western Railroad Company, defendant was, in 1923, formed under, among others, the Railroad Law of the State of New York by a consolidation of five railroad corporations, among which was the Lake Erie & Western Railroad Company, and Section 143 of the Railroad Law provides in substance that upon its formation a consolidated railroad corporation assumes by implication of law the liabilities of the corporations to which it succeeds. The question is presented, therefore, whether Section 20 (a) of the Interstate Commerce Act or Section [fol. 34] 143 of the Railroad Law controls in the present case.

Defendant contends that where, as in the case at bar, the consolidated corporation is a "carrier" and the liability of its constituent is a liability as guarantor of the bonds of another corporation, such liability cannot be assumed by the consolidated corporation without the authorization of the Interstate Commerce Commission; that section 143 of the Railroad law, in so far as it purports to provide for an assumption of such a liability by a "carrier", is inconsistent with Section 20 (a) of the Interstate Commerce Act; that, accordingly, as applied to the facts of the instant case, Section 143 of the Railroad Law was superseded pro tanto by Section 20 (a) of the Interstate Commerce Act when said Section 20 (a) was enacted in 1920 and finally, that not having been authorized by the Interstate Commerce Commission to assume any liability as guarantor of the Northern Ohio bonds or coupons, defendant cannot be held liable on the basis of any purported assumption of said guaranty, whether said assumption is claimed to have been expressed or implied in fact or implied in law.

The Interstate Commerce Act, of course, overrides all state statutes, being the supreme law of the land.

The present action is not brought against the L. E. & W. It is brought against the defendant, The New York, Chicago and St. Louis Railroad Company. Before it can become material to determine whether or not the L. E. & W. is [fol. 35] liable on the alleged guaranty of the Northern Ohio bonds, it must first be determined whether, even if the L. E. & W.'s liability be assumed, liability on the part of the

defendant can be predicated thereon. If the latter question is resolved in defendant's favor, as it is submitted it must be, the present complaint must be dismissed. In that event, it will not be necessary, in this action, to determine whether or not the L. E. & W. be in fact liable as guarantor of the Northern Ohio bonds and the questions presented by the plaintiff's motion for summary judgment and dealt with in the remaining portion of this affidavit, need not be considered.

* * * * * * *

I believe there is no merit to this action.

Wherefore, it is prayed that this Court make and enter an order granting defendant's cross-motion for summary judgment and that, in any event, plaintiff's motion for summary judgment be denied.

Theodore Sherwood Hope, Jr.

Verified January 20, 1940.

[fol. 36] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of ——,
County of ——, ss:

C. C. Collister, being first duly sworn, deposes and says:

I am and ever since the formation in 1923 of The New York, Chicago and St. Louis Railroad Company, the defendant in the above-entitled action, have been the Assistant Secretary thereof. I make this affidavit in support of its cross motion for summary judgment and in opposition to the plaintiff's motion for summary judgment in said action.

At the time of the consolidation hereinafter mentioned, I was the General Attorney and the Assistant Secretary of the former The New York, Chicago and St. Louis Railroad Company, the Secretary of The Lake Erie and Western Railroad Company, and the Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company and had held those offices continuously from June 24, 1922, from June

2, 1922, from May 10, 1922, and from May 26, 1922, respectively.

The defendant was formed by the consolidation, perfected April 11, 1923, of five railroad companies, (including [fol. 37] those named in the immediately preceding paragraph) by and pursuant to an Agreement and Articles of Consolidation made and entered into the 28th day of December, 1922, between the said five companies and their respective boards of directors and under and in accordance with the respective laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois. A true copy of said Agreement and Articles of Consolidation is hereto attached, marked "Exhibit A", and hereby made a part hereof. This consolidation has never been approved by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, and no application to it for such approval has ever been made.

The Interstate Commerce Commission has never authorized, pursuant to Section 20a of the Interstate Commerce Act, the assumption by the defendant of any obligation or liability as lessor, lessee, guarantor, endorser, surety or otherwise in respect of any bonds or bond of The Northern Ohio Railway Company, the corporation of that name mentioned in the complaint in said action, and the defendant has never applied to said Commission for any such authority.

The defendant has never expressly assumed any such obligation or liability.

C. C. Collister.

Verified January 19, 1940.

[fol. 38] ATTACHED TO THE AFFIDAVIT OF C. C. COLLISTER, AS EXHIBIT "A"

is the

AGREEMENT AND ARTICLES OF CONSOLIDATION

dated

December 28, 1922

between

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE CHICAGO AND STATE LINE RAILROAD COMPANY, THE LAKE ERIE AND WESTERN RAILROAD COMPANY, FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY, and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY for the consolidation of said companies into one company to be known as the NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, whereby it is agreed—

"That in consideration of the mutual agreements, covenants and provisions herein contained, the parties hereto do by these presents merge and consolidate the respective capital stocks, franchises, and properties of the aforesaid constituent companies into one corporation to be called and known as 'The New York, Chicago and St. Louis Railroad Company', which said consolidated corporation shall from henceforth have and possess all and singular the rights, franchises, powers, exemptions, immunities, privileges and capacities, which are or have been granted to or conferred upon, or possessed or enjoyed by the said constituent companies.

"And this agreement further witnesseth, that the parties hereto have agreed upon and by these presents do agree upon and prescribe the following as the terms and conditions of this agreement and articles of consolidation, which terms and conditions the parties hereto mutually promise and agree to observe, keep and perform, viz.:"

[fol. 39] Articles I to XII, inc.

Provide for the name of the consolidated corporation, its principal office, directors and officers, by-laws, meetings, issuance of stock, rights of stockholders to share in the assets and earnings of corporation, and powers.

Article XIII

"Such merger and consolidation shall take effect and the said consolidated corporation shall go into operation when and so soon as this agreement and articles of consolidation shall have been duly executed and shall have been adopted by the stockholders of the respective constituent companies in the manner prescribed by law and the fact of such adoption shall have been certified hereupon by the secretaries of said constituent companies under the seals thereof as required by law, and this agreement so adopted and so certified, or a copy thereof, shall have been filed in the offices of the secretaries of state of the States of Illinois, Indiana, New York, Ohio and Pennsylvania, and, if required, in the office of the recorder of the various counties of the State of Illinois, in which the lines of the constituent railroads are situated, and in the office of the clerk of Erie County, New York, and thereupon and thereafter all the railroads, estates and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, terms and parts of terms, agreements, covenants, contracts, tariffs and obligations, and all property of every description, name and nature, held, owned, or occupied by or belonging to the constituent companies aforesaid, or any of them, shall be and become and be vested in and be thereafter owned, used and enjoyed by said consolidated corporation, without any further deed, transfer or conveyance and as fully and effectually to all intents and purposes as the same are now held by each of the said constituent companies respectively. And the board of directors of said consolidated corporation shall have full power to carry said merger and consolidation into effect by all acts necessary or proper for such purpose.

"The foregoing enumeration shall not be deemed to [fol. 40] exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Article XIV

The existence of the consolidated corporation shall be perpetual.

[fol. 41] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of ——,
County of ——, ss.:

H. F. Lohmeyer, being first duly sworn, deposes and says:

I am the Secretary and the Treasurer of The New York, Chicago and St. Louis Railroad Company, the defendant in the above-entitled action, and make this affidavit in support of its cross motion therein for summary judgment and in opposition to the plaintiff's motion for summary judgment.

The defendant was formed by the consolidation, perfected April 11, 1923, of the former The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company, by and pursuant to an Agreement and Articles of Consolidation made and entered into the 28th day of December, 1922, between those companies and their respective boards of directors and under and in accordance with the respective laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois.

As the Secretary of the defendant, I have possession and custody of all of its books and other records relating [fol. 42] to each and every meeting of its stockholders, of its Board of Directors, and of the Executive Committee of said Board, including the official minutes of each such meeting; together with similar records of each of said consolidating companies, containing the official minutes of each meeting of its stockholders, of its Board of Directors, and of the Executive Committee of said Board at which any action with reference to said consolidation was taken. If there had ever been any corporate authorization of any application by said consolidating companies, or any of them, or by the defendant to the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, for approval of said consolidation, or any corporate authorization of any application by or on behalf of the defendant to said Commission, pursuant to Section 20a of

that Act, for authority for the assumption by the defendant of any obligation or liability as lessor, lessee, guarantor, endorser, surety or otherwise in respect of any bonds or bond of The Northern Ohio Railway Company, or any corporate authorization of any such assumption, the fact of such corporate authorization would have been recorded in said books or records of one or more of said consolidating companies or of the defendant. There is in none of them any record of any corporate authorization of any such assumption or of any such application, either for approval of said consolidation or for authority for any such assump-[fol. 43] tion by the defendant. At the time of and ever since said consolidation, the rules and regulations of said Commission required and have required such corporate authorization in the case of every application for such authority.

I am accordingly in a position to state and do state that said consolidation never has been approved by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act; that no application for such approval has ever been made to said Commission; that the defendant has never been authorized by said Commission, pursuant to Section 20a of said Act, to assume any obligation or liability whatever in respect of any bonds or bond of The Northern Ohio Railway Company; that the defendant has never applied to said Commission for any such authority; and that the defendant has never expressly assumed any such obligation or liability.

I believe that there is no merit to this action.

Wherefore, it is prayed that this Court make and enter herein an order denying the plaintiff's motion for summary judgment and granting defendant's motion for summary judgment dismissing the complaint herein with costs of this motion and of this action.

H. F. Lohmeyer.

Verified January 19, 1940.

[fol. 44] In Municipal Court of City of New York

Hon. Thomas J. Whalen, Justice

House, Grossman, Vorhaus & Hemley, Esqs., 521 Fifth Avenue, New York, N. Y., Attorneys for the Plaintiff.

Donovan, Leisure, Newton & Lumbard, Esqs., 2 Wall Street, New York, N. Y., Attorneys for the Defendant.

Opinion—March 15, 1940

Whalen, J.:

Plaintiff moves for summary judgment in an action upon interest coupons attached to bonds issued by the Northern Ohio Railway Company under date of October 1, 1895, bearing the guaranty of punctual payment endorsed thereon by The Lake Erie & Western Railroad Company. There are five causes of action based upon five separate coupons, maturing April 1, 1939, in the sum of $25 each, and unpaid. The defendant is a consolidated corporation organized April 11, 1923, pursuant to the statutes of New York, Pennsylvania, Ohio, Indiana and Illinois, and is being sued as a New York corporation. The Lake Erie & Western Railroad Company was an Illinois corporation and was one of the constituents of the consolidated corporation.

[fol. 45] Section 143 of the Railroad Law of the State of New York, pursuant to which the consolidation was effected, provides that the debts and liabilities of the several consolidating corporations shall attach to and become liabilities of the consolidated corporation. Hence this suit against this defendant.

Defendant interposes two defenses:

1) That the guaranty given by The Lake Erie & Western was ultra vires and wholly void.

2) That the defendant, an interstate carrier, was never authorized by the Interstate Commerce Commission to assume the guaranty as required by Section 20(a) of the Interstate Commerce Act, and that without that authorization there can be no liability inasmuch as any such assumption of liability is illegal and void.

In its brief defendant does not question the sufficiency of the affidavits presented on plaintiff's affirmative case.

In support of its defense of ultra vires defendant presents voluminous affidavits and exhibits from the records of the

corporations directly involved which, it is claimed, raise at least an issue of fact as to the power of The Lake Erie & Western to guarantee payment of the bonds and coupons [fol. 46] of the Northern Ohio, and consequently require a denial of the motion.

Briefly summarized, defendant presents the following facts respecting the history and relationships of defendant, The Lake Erie & Western and the Northern Ohio:

The Lake Erie & Western was an Illinois corporation organized February 10, 1887.

The Pittsburgh, Akron & Western Railway Company was an Ohio corporation operating a line of railway in the State of Ohio. In 1894, having defaulted in payment of interest on its first mortgage bonds, a proceeding was brought to foreclose the mortgage and a decree of foreclosure was entered, May 23, 1894.

On October 8, 1894, at a director's meeting of The Lake Erie & Western, the President, Calvin S. Brice, was authorized to acquire the railway if he could do so within certain limited terms. He thereafter conducted negotiations through a corporation controlled by him, called the Central Contract & Finance Co., with a Committee representing the bondholders on the defaulted bonds of the P. A. & W. leading to an agreement whereby The Lake Erie & Western, instead of purchasing the railway outright, arranged to organize a new corporation to which title would pass and then have The Lake Erie & Western lease the line railway perpetually [fol. 47] and pay as rental the net proceeds of the line to the lessor and also to guarantee payment of principal and interest of bonds to be issued by the new corporation. This was later done except that the line was leased for 999 years instead of perpetually. A new corporation, the Northern Ohio Railway Co. was organized under the laws of the State of Illinois. The Northern Ohio issued bonds in the amount of $2,500,000, secured by a first mortgage on its line and The Lake Erie & Western arranged with a syndicate of bankers, headed by Vermilye & Co., to sell the bonds with the guaranty of The Lake Erie & Western endorsed thereon. From the records it appears that this guaranty was a very important, if not the principal, consideration for the purchase of the bonds.

A lease was given by the Northern Ohio to The Lake Erie & Western, of all its properties for 999 years. All these proceedings were approved and thereafter ratified

by the Boards of Directors and stockholders of both corporations, the active agent at all times being Calvin S. Brice, the President of The Lake Erie & Western.

While all these various steps took time and were accomplished on various dates, the effective date of the whole operation including the bonds, mortgage and lease, was October 1, 1895. Thereafter, until 1919, the line of rail [fol. 48] way owned by the Northern Ohio was operated under the lease by The Lake Erie & Western.

As to the defense of ultra vires, defendant cites the general principle, to the effect that a corporation, unless authorized by its charter or the statutes of the state of its organization, is without authority to guarantee the bonds or debts of any other corporation. This rule is expressed in the following excerpt from Louisville, (etc.) Ry. Co. vs. Louisville Trust Co., 174 U. S. 552 (1898):

"A railroad corporation unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel."

However, there are exceptions to this general rule and in the opinion in the same case, at page 573, appears the following:

"One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary, in the name and under the seal of the corporation and disclosing upon its face, no want of authority, has the right to [fol. 49] assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."

These bonds and their interest coupons, payable to bearer, are negotiable instruments.

Evertson vs. National Bank of Newport, 66 N. Y. 15.

There is no reason shown here to doubt that plaintiff is a bona fide purchaser for value without notice of any defect in these bonds or coupons.

The Lake Erie & Western was an Illinois corporation organized in 1887. It was not expressly authorized either in its Articles of Incorporation or by any general statute of Illinois to guarantee the obligations of any other person, natural or artificial. The power, if it had any, to make the guaranty must be found in the implied powers of the corporation. A corporation has implied powers to do all things necessary or incidental to the exercise of the powers expressly granted.

Calumet etc. Dock Co. vs. Conkling, 273 Ill. 318-322.

Under the statutes of Illinois (Act of February 12, 1855; Laws 1855, p. 304) a railroad corporation of that State had [fol. 50] power to enter into leases with other railroad corporations:

Pennsylvania R. R. Co. vs. St. Louis, Alton & Terre Haute Railroad Company, 118 U. S. 290 (1885).

It has been held that if a railroad corporation has power to take a lease of the lines of another corporation it has power to make agreements appropriate to such a transaction, such as payment of rent and guaranteeing payment of bonds of the lessor.

6 Fletcher Cyc. Corp., Sec. 2719, p. 574.

Eastern Townships Bank vs. St. Johnsbury & L. C. R. Co., 40 Fed. 423, writ of error dismissed 149 U. S. 772.

When a railroad corporation has possession of bonds of another railroad corperation it has power to endorse its guaranty thereon for the purpose of sale.

Railroad Co. vs. Howard, 7 Wall 392 (1868).

Arnot vs. Erie Railway Co., 67 N. Y. 315 (1876).

When the guarantor is in reality the principal and the ostensible obligor on the bonds is in reality the creature [fol. 51] of the guarantor the guarantee will be valid.

Lake St. El. R. R. Co. vs. Carmichael, 184 Ill. 348 (1900).

It seems to me that this case comes within all of these exceptions to the general rule.

The guaranty was not executed for the accommodation of the Northern Ohio, but the entire transaction was a device engineered by The Lake Erie & Western for its own accom-

modation, in order to enable it to acquire control of the line of the old P. A. & W. so as to extend The Lake Erie & Western lines eastward.

Calvin S. Brice gave the instructions to a firm of attorneys for the organization of the Northern Ohio, for the preparation of the bond and mortgage and for the preparation of the lease. The Lake Erie & Western was the principal in the same way as the railroad was the principal in the Carmichael case.

Defendant claims The Lake Erie & Western never had actual possession of the bonds but they constructively passed through the hands of its secretary when he authorized delivery to Vermilye & Co., and in any event the question is not what was actually done but what The Lake Erie & Western had power to do so far as an innocent purchaser for value is concerned.

[fol. 52] Louisville (etc.) Ry. Co. vs. Louisville Trust Co., (supra)

The information about this was not a matter of public record and defendant would be estopped from setting up any mere irregularity as against this defendant. (Idem p. 575.)

The Lake Erie & Western had express power under the Illinois statute to enter into a lease arrangement with another railroad and it had implied power to make such terms as were necessary to carry out the lease.

In the case of Eastern Townships Bank vs. St. Johnsbury & L. C. R. Co. (supra) it was held that a lessee railroad corporation had power to guarantee payment of the bonds of its lessor, in view of a state statute authorizing one railroad corporation to lease the lines of another. The Vermont statute (R. L. Vt. Sec. 3303) is similar to the Illinois statute (L. 1855, p. 304, R.S. 1874, p. 807).

The cases of ultra vires cited by defendant are all cases where the transactions were held to be ultra vires because they were not made in furtherance of the purposes for which the corporations were organized, or because they were made in direct violation of a statute, such as the statutes of Illinois relating to the acquisition of land by a [fol. 53] corporation. No Illinois statute has been cited prohibiting a railroad corporation from guaranteeing bonds in any case and under any circumstances. Defendant has

cited no case which pushes the doctrine of ultra vires to the extent urged in this case.

In support of its second defense, defendant cites Section 20 (a) of the Interstate Commerce Act, and submits affidavits showing that no application was ever made to, or authorization ever granted by, the Interstate Commerce Commission to the assumption by defendant of liability on the guaranty in question.

Defendant urges this as a conclusive bar to the action and because the facts are not disputed makes a cross motion for summary judgment in its favor.

Section 143 of the Railroad Law of the State of New York provides that in case of consolidation "all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation."

Section 20 (a) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, provides that it shall be unlawful for any carrier to issue or assume any liability in respect of the securities of any other person, [fol. 54] natural or artificial, unless the Interstate Commerce Commission authorizes such assumption.

Defendant claims that Section 20 (a) supersedes Section 143 of the New York Railroad Law and, inasmuch as no authorization has been obtained, the consequence is defendant has assumed no liability as guarantor of the Northern Ohio bonds.

Again defendant cites no cases directly in point. It claims that

> Missouri-Kansas Texas R. Co. of Texas v. Mars, 294 S. W. 941 (Texas Civil Appeals 1927)

is in point, but that case was reversed by the Texas Commission of Appeals (298 S.W. 271, 1927), and the reversal was affirmed by the United States Supreme Court (278 U.S. 258) on the ground that securities were not involved in the case.

It seems to me that the dispute here revolves around the meaning to be given to the word "assume" as used in Section 20 (a) of the Interstate Commerce Act. If that means something different than the liability imposed by Section 143 of the Railroad Law of the State of New York, the two statutes may be reconciled and there is no conflict between them. If they do have the same meaning, then

undoubtedly the Commerce Act controls because it is the supreme law of the land.

[fol. 55] The word "assume" connotes a voluntary action and is directly applicable to leases where a lessee railroad attempts to assume liability on the debt of its lessor. This happened in

> New York Central Securities Corp. v. U. S., 54 Fed. (2d) 122, S.D. N.Y., 1931, aff'd. 287 U.S. 12 (1932)

Words & Phrases, Fifth Series, Vol. 1, p. 592, defines the word "assume" as "to take upon oneself."

The word "assume" does not appear in Section 143 of the Railroad Law. Defendant argues as though it does. Instead the word "attach" appears. At the moment of consolidation the defendant did not "assume" the debts of The Lake Erie & Western. Instead, these debts immediately became its own debts. It required a direct liability of its own. It did not at that moment guarantee any debt of The Lake Erie and Western, but, rather, became liable on its own debt which attached by reason of the statute. It did not assume an "obligation" of any other person, natural or artificial.

No instance has been cited to me of any application to the Interstate Commerce Commission by a consolidated corporation to assume the debts of the constituent corporations, and I think the reason may be found in the fact that the Interstate Commerce Commission has not yet assumed [fol. 56] jurisdiction over the subject of consolidation under Section 5 of the Interstate Commerce Act, but has left these proceedings entirely to the jurisdiction of the States.

> Snyder v. New York, Chicago & St. Louis R. Co., 278 U.S. 578.
>
> Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 71 I.C.C. 581.

Therefore, no approval was sought of the Commission for the consolidation and none was necessary.

The Commission did, however, issue a certificate of convenience and necessity and must have done so with knowledge of the incidents of the consolidation under State law, including the attaching of the liabilities of the constituent corporations to the consolidating corporation.

The complaint, it seems to me, falls into the same error in the use of the word "assume" in the fifth paragraph. However, as that is a conclusion of law, it may be disregarded as surplussage, inasmuch as the other allegations of the paragraph (if we accept the word "merger" as meaning "consolidation") state the essential facts for a cause of action.

My conclusion is that it was not necessary for the defendant to make an application to the Interstate Commerce Commission or to receive its authorization under Section [fol. 57] 20 (a) before becoming liable on The Lake Erie & Western guaranty of the Northern Ohio bonds.

It follows that defendant's motion for summary judgment must be denied, and plaintiff's motion will be granted.

[fol. 58] In Municipal Court of City of New York

Order Granting Plaintiff's Motion for Summary Judgment

Hon. Thomas J. Whalen, Justice.

The following papers numbered 1 to 9 and A to Y read on this motion for summary judgment in favor of the plaintiff this 24th day of January 1940.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits on cross-motion	1-7
Exhibits	A-Y inc.
Copies Papers Pleadings	3
Stipulations	5, 6, 7, 8, 9
Deft. Notice	4

Upon the foregoing papers this motion is granted. Execution stayed for 5 days after service of a copy of this order with notice of entry.

See Opinion.

Dated New York City, March 18, 1940.

Enter.

T. J. W. J. M. C.

[fol. 59] In Municipal Court of City of New York

Order Denying Defendant's Cross Motion for Summary Judgment

Hon. Thomas J. Whalen, Justice.

The following papers numbered 1 to 7 & A to Y read on this motion dismiss the complaint this 24th day of January, 1940.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 to 7
Exhibits	A to Y inc.

Upon the foregoing papers this motion is denied.
See memo on plaintiff's cross-motion.
Dated Mar. 18, 1940.
Enter.

T. J. W. J. M. C.

[fol. 60] In Municipal Court of City of New York

Judgment

Amount awarded after Motion for Summary Judgment		$125.00
Interest		7.20
Total		$132.20
Costs by Statute	$7.50	
Service of summons and complaint	1.50	
Filing of summons and complaint	2.00	
Prospective Marshal's Fee	1.00	12.00
Total		$144.20

State of New York,
City of New York,
County of New York, ss:

Morris L. Wolf, being duly sworn, deposes and says: That I am an attorney in the office of House, Grossman, Vorhaus & Hemley, the attorneys for the plaintiff herein. That the disbursements above specified have been made in the said action or will necessarily be made or incurred

therein. That a decision has been made and rendered by Hon. Thomas J. Whalen, one of the Justices of this Court by order dated March 18th, 1940, and entered in the office of the Clerk of this Court on the 19th day of March, 1940, awarding the plaintiff summary judgment against the de-
[fol. 61] fendant, as demanded in the complaint.

Morris L. Wolf.

Verified March 19, 1940.

Judgment entered the 20th day of March, 1940.

The summons and complaint in this action having been personally served on the defendant and the defendant having appeared and answered by its attorneys, Donovan, Leisure, Newton & Lumbard, and the plaintiff having moved by notice of motion for summary judgment for the relief demanded in the complaint, and the said motion having been granted by order of Mr. Justice Whalen dated the 18th day of March, 1940, and filed in the office of the Clerk of this Court on March 19th, 1940.

Now, on Motion of House, Grossman, Vorhaus & Hemley, attorneys for the plaintiff, it is

Adjudged, that Dorothea T. Frank, the plaintiff, recover of New York, Chicago & St. Louis Railroad Company, the defendant, the sum of $125.00, with interest of $7.20, making a total of $132.20, together with $12.00 costs and disbursements, amounting in all to the sum of $144.20, and that the plaintiff have execution therefor.

March 20, 1940.

Five (5) days stay of execution.

George J. McMahon, Clerk.

[fol. 62] In Municipal Court of City of New York

Amended Notice of Appeal

Sirs:

Please Take Notice that the New York, Chicago and St. Louis Railroad Company, the defendant in the above entitled action, hereby appeals to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment entered herein, in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, on the 20th day of March, 1940, in

favor of the plaintiff, and against said defendant, and for the sum of $144.20, and from the whole of said judgment, and each and every part thereof.

Please Take Further Notice that the appellant intends to bring up for review on such appeal the orders made and entered herein on the 19th day of March, 1940, granting the plaintiff's motion for summary judgment herein and denying the defendant's cross motion for summary judgment herein.

Dated: New York, N. Y., March 23rd, 1940.

[fol. 63] Yours, etc., Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office and Post Office Address, No. 2 Wall Street, Borough of Manhattan, New York, N. Y.

To: House, Grossman, Vorhaus & Henley, Attorneys for Plaintiff, Office and Post Office Address: No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

George J. McMahon, Esq., Clerk of Municipal Court, Borough of Manhattan, Ninth District, 624 Madison Avenue, New York, N. Y.

[fol. 64] In Supreme Court of New York, Appellate Term—First Department

Dorothea T. Frank, Plaintiff-Respondent,

against

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Stipulation

It is hereby stipulated, consented and agreed, by and between the undersigned that Exhibit "A", attached to the affidavit of C. C. Collister herein, being the Agreement and Articles of Consolidation of the New York, Chicago & St. Louis Railroad Company, dated December 28, 1922, need not be printed or reproduced in the case and record on appeal or any other or subsequent appeal which may be taken by either of the parties herein, but that said exhibit shall be deemed a part of said case and record as fully and with the same force and effect as if reproduced therein in

full; and that such exhibit may be referred to in the briefs and referred to and handed up to the Court on the argument of said appeal by either party hereto; and that in said case and record on appeal in place of the reproduction of said exhibit may be substituted the following summary thereof:

[fol. 65] ATTACHED TO THE AFFIDAVIT OF C. C. COLLISTER, AS EXHIBIT "A"

is the

AGREEMENT AND ARTICLES OF CONSOLIDATION

dated

December 28, 1922

between

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE CHICAGO AND STATE LINE RAILROAD COMPANY, THE LAKE ERIE AND WESTERN RAILROAD COMPANY, FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY, and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY for the consolidation of said companies into one company to be known as the NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, whereby it is agreed—

"That in consideration of the mutual agreements, covenants and provisions herein contained, the parties hereto do by these presents merge and consolidate the respective capital stocks, franchises, and properties of the aforesaid constituent companies into one corporation to be called and known as 'The New York, Chicago and St. Louis Railroad Company' which said consolidated corporation shall from henceforth have and possess all and singular the rights, franchises, powers, exemptions, immunities, privileges and capacities, which are or have been granted to or conferred upon, or possessed or enjoyed by the said constituent companies.

"And this agreement further witnesseth, that the parties hereto have agreed upon and by these presents do agree upon and prescribe the following as the terms and conditions of this agreement and articles of consolidation, which terms and conditions the parties hereto mutually promise and agree to observe, keep and perform, viz:"

[fol. 66] Articles I to XII, inc.

Provide for the name of the consolidated corporation, its principal office, directors and officers, by-laws, meetings, issuance of stock, rights of stockholders to share in the assets and earnings of corporation, and powers.

Article XIII

"Such merger and consolidation shall take effect and the said consolidated corporation shall go into operation when and as soon as this agreement and articles of consolidation shall have been duly executed and shall have been adopted by the stockholders of the respective constituent companies in the manner prescribed by law and the fact of such adoption shall have been certified hereupon by the secretaries of said constituent companies under the seals thereof as required by law, and this agreement so adopted and so certified, or a copy thereof, shall have been filed in the offices of the secretaries of state of the States of Illinois, Indiana, New York, Ohio and Pennsylvania, and, if required, in the office of the recorder of the various counties of the State of Illinois, in which the lines of the constituent railroads are situated, and in the office of the clerk of Erie County, New York, and thereupon and thereafter all the railroads, estates and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, terms and parts of terms, agreements, covenants, contracts, tariffs and obligations, and all property of every description, name and nature, held, owned, or occupied by or belonging to the constituent companies aforesaid, or any of them, shall be and become and be vested in and be thereafter owned, used and enjoyed by said consolidated corporation, without any further deed, transfer or conveyance and as fully and effectually to all intents and purposes as the same are now held by each of the said constituent companies respectively. And the board of directors of said consolidated corporation shall have full power to carry said merger and consolidation into effect by all acts necessary or proper for such purpose.

"The foregoing enumeration shall not be deemed to [fol. 67] exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Article XIV

The existence of the consolidated corporation shall be perpetual.

Dated: New York, N. Y., April 22, 1940.

House, Grossman, Vorhaus & Henley, Attorneys for Plaintiff-Respondent.

Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant-Appellant.

[fol. 68] In Supreme Court of New York, Appellate Term—First Department

Present: Hon. Ernest E. L. Hammer, Hon. Bernard L. Shientag, Hon. Julius Miller, Justices.

12590—40 #75 MC June

Dorothea T. Frank, Plaintiff-Respondent,

vs.

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Judgment—Filed June 28, 1940

An appeal having been taken to this Court by defendant from judgment of the Municipal Court of the City of New York, Borough of Manhattan, 9th Dist., entered on the 20th day of March, 1940, and orders entered on the 19th day of March, 1940, and the said appeal having been heard and due deliberation having been had thereon,

It is ordered and adjudged that the judgment and orders [fol. 69] so appealed from be and the same are hereby affirmed, with $25 costs.

Enter.

E. E. L. H., Justice Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 70] In Municipal Court of City of New York

Present: Hon. Lester Lazarus, Justice.

Clerk's Index No. 8547—1939

Dorothea T. Frank, Plaintiff-Respondent,

against

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Order Adopting Judgment of Appellate Term—July 3, 1940

On reading and filing the annexed affidavit of Morris L. Wolf, sworn to the 3rd day of July, 1940, and on reading the order of the Appellate Term, First Department, dated June 28th, 1940, a copy of which is annexed hereto, it is, on motion of House, Grossman, Vorhaus & Hemley, attorneys for the plaintiff herein,

Ordered, that the said order of the Appellate Term [fol. 71] affirming the judgment and orders appealed from with Twenty-Five ($25) Dollars costs, be, and the same hereby is, made the order of this Court, and the Clerk is directed to enter judgment accordingly.

Enter.

L. L., J. M. C.

Filed July 5, 1940.

[fol. 72] In Municipal Court of the City of New York, Borough of Manhattan

Ninth District

Clerk's Index No. 8547-1939

Dorothea T. Frank, Plaintiff,

against

New York, Chicago & St. Louis Railroad Company, Defendant.

Judgment on Affirmance—Filed July 5, 1940

The above-named defendant having appealed to the Appellate Term of the Supreme Court, First Department,

from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, entered on the 20th day of March, 1940, and also from the orders made and entered therein on the 19th day of March, 1940, and the said appeal having been duly heard and due deliberation having been had thereon, and the said Appellate Term having by its order dated June 28th, 1940, ordered and adjudged that the judgment and orders so appealed from be affirmed with $25.00 costs, and said order having been duly filed in the office of the Clerk of the County of New York, on June 28th, 1940, and a certified copy thereof, together with the Remittitur, having been filed in the office of the Clerk [fol. 73] of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, on the 2nd day of July, 1940, and an order dated July 3rd, 1940 having been duly made and entered herein, making the said order of the Appellate Term the Order of this Court and directing the Clerk to enter judgment accordingly, and the costs of the appeal having been duly taxed by the Clerk, it is

Now On Motion of House, Grossman, Vorhaus & Hemley, attorneys for plaintiff Dorothea T. Frank,

Adjudged, that the judgment and orders so appealed from be and the same are hereby in all things affirmed, and it is further

Adjudged, that Dorothea T. Frank do recover of the New York, Chicago & St. Louis Railroad Company, the sum of Twenty Six and 00 100 ($26.00) Dollars, costs and disbursements, and that the plaintiff have execution therefor.

Dated, N. Y. July 5, 1940.

George J. McMahon, Clerk.

[fol. 74] In Supreme Court of New York

Appellate Term

(Title Omitted)

Order Denying Leave to Appeal—Filed August 12, 1940

The above named defendant having moved for leave to appeal to the Appellate Division from the determination of the Appellate Term herein

Now upon reading and filing order to show cause, dated July 8, 1940 and the affidavit of David Teitelbaum verified the 3rd day of July 1940 in favor of said motion, and the affidavit of Louis J. Vorhaus verified the 9th day of July, 1940 in opposition thereto,

It Is Ordered that said motion be and the same hereby [fol. 75] is denied, with $10 costs, and stay vacated.

Enter.

E. E. L. H. Justice, Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 76] In Supreme Court of New York

Appellate Division

Present: Hon. Francis Martin, Presiding Justice, Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Justices.

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Order on Application for Leave to Appeal From Appellate Term

Dorothea T. Frank, Respt.,

vs.

New York, Chicago & St. Louis Railroad Company, Applt.

Order Denying Leave to Appeal—October 9, 1940

An application having been made by the defendant to the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the determination of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on the 28th day of June, 1940, for a consolidation of the appeal for which leave is sought with the appeal in the case of Lawrence H. Friedman vs. The New York, Chicago and St. Louis Railroad Company, and for a stay pending said appeal, and the said application having come on [fol. 77] to be heard, on reading and filing the notice of

application herein, dated August 13, 1940, and the affidavits of David Teitelbaum and John H. Agate in support of said application, and the affidavit of Joseph Fischer in opposition thereto and the affidavit of Irving D. Friedman and after hearing Mr. David Teitelbaum for the application, and Mr. Joseph Fischer opposed,

It is ordered that said application be and the same hereby is denied with $10 costs, and that the stay contained in the order to show cause herein, dated August 13, be and the same hereby is vacated.

Enter.

[fol. 78] SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE AND ACKNOWLEDGMENT OF SERVICE

SIRS:

Please Take Notice that attached hereto are true copies of the following papers, which are herewith served upon you:

1. Petition for and order allowing appeal.
2. Assignments of error.
3. Statement showing jurisdiction of Supreme Court of the United States.
4. Citation.
5. Statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court of the United States.
6. Supersedeas bond.

Yours, etc. William J. Donovan, Counsel for Appellant, 2 Wall Street, Borough of Manhattan, City of New York.

[fol. 79] To: Messrs. House, Grossman, Vorhaus & Henley, 521 Fifth Ave., Manhattan, New York, N. Y., Counsel for Appellee.

Service upon the undersigned of the foregoing list of papers is hereby acknowledged this 11th day of October, 1940.

(sgd) House, Grossman, Vorhaus & Hemley, Counsel for Appellee.

[fol. 80] SUPREME COURT OF THE UNITED STATES

Petition for Appeal, Assignment of Errors, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, in the above-entitled cause, the defendant, New York, Chicago & St. Louis Railroad Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order granting supersedeas fixing the amount of the required bond.

ASSIGNMENT OF ERRORS

And said defendant, New York, Chicago & St. Louis Railroad Company assigns the following errors in the record and proceedings in the said case:

First. The Court erred in holding that Section 143 of the Railroad Law of the State of New York, as applied to the facts of this case, is not repugnant to Section 20a of the Federal Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

Second. The Court erred in holding that Section 143 of the New York Railroad Law, as applied to the facts of this [fols. 81-104] case is not in conflict with Section 20a of the Interstate Commerce Act. (U. S. C., Title 49, Section 20a, 41 Stat. 494).

Third. The Court erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies.

Fourth. The Court erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the

assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a.

Prayer for Reversal

For which errors the defendant, New York, Chicago & St. Louis Railroad Company prays that the said judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, dated June 28, 1940, in the above-entitled cause, be reversed, and a judgment rendered in favor of the said defendant, and for costs.

Dated, October 10th, 1940.

(Sgd.) William J. Donovan, Counsel for Appellant.

[fol. 105] Supreme Court of the United States

Order Allowing Appeal

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Appellate Term of the Supreme Court of the State of New York, First Department, on the 28th day of June, 1940, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here Ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the Appellate Term of the Supreme Court of the State of New York, First Department, in the above entitled cause, as provided by law, and it is further Ordered that the clerk of the Appellate Term of the Supreme Court of the State of New York, First Department, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

[fol. 106] It is Further Ordered, that said Appellant shall file a bond in the penal sum of $1,000.00, with good and

sufficient surety, that he shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good.

It is Further Ordered that upon giving the above-mentioned security, this appeal shall operate as a supersedeas, and that execution and other proceedings under the judgment appealed from shall be stayed, pending this appeal.

Dated: October 11, 1940.

(Sgd.) Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

[fol. 107] Citation in usual form omitted in printing.

[fols. 108-121] Supersedeas bond on appeal for $1,000.00 approved, omitted in printing.

[fol. 122] In Supreme Court of New York, Appellate Term

Praecipe for Transcript of Record

To the Clerk of the County of New York and of the Supreme Court of the State of New York, Appellate Term, First Department:

You Are Hereby Requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Complaint, verified June 3, 1939.

2. Answer, verified July 31, 1939, excluding paragraphs Third, Fourth and Fifth, thereof.

3. Notice of Plaintiff's motion for summary judgment, dated December 30, 1939.

4. Affidavit of Dorothea T. Frank in support of plaintiff's motion for summary judgment, verified December 22, 1939, excluding the first two full paragraphs on page 14 of the original papers on appeal to the Appellate Term, and the first full paragraph on page 15 of said papers.

5. Admissions of defendant, dated November —, 1939, excluding Exhibit A thereto.

6. Notice of defendant's cross motion for summary judgment, dated January 20, 1940.

[fol. 123] 7. Affidavit of Theodore Sherwood Hope, Jr., in support of defendant's cross-motion for summary judgment, verified January 20, 1940, excluding the material beginning with the first full paragraph on page 51 of the original papers on appeal to the Appellate Term, and ending with the first full paragraph on page 62 of said papers, but including the second full paragraph on said page 62, constituting the prayer for relief.

8. Affidavit of C. C. Collister in support of defendant's cross-motion for summary judgment, verified January 19, 1940, including Exhibit A thereto.

9. First affidavit of H. F. Lohmeyer in support of defendant's cross-motion for summary judgment, verified January 19, 1940, and appearing on pages 68 to 71 of the original papers on appeal to the Appellate Term.

10. Opinion of Whalen, J., in the Municipal Court, excluding material beginning with the second full paragraph on page 293 of original papers on appeal to Appellate Term, and ending with the fourth line on page 301 of said papers.

11. Order of Municipal Court granting plaintiff's motion for summary judgment, made and entered March 18, 1940.

12. Order of Municipal Court denying defendant's motion for summary judgment, made and entered March 18, 1940.

13. Judgment of Municipal Court, made and entered March 20, 1940.

[fol. 124] 14. Notice of appeal to Appellate Term from judgment and orders of Municipal Court, dated March 23, 1940.

15. Stipulation, dated April 22, 1940, waiving complete reproduction in records upon subsequent appeals of Exhibit A to affidavit of C. C. Collister in support of defendant's cross-motion for summary judgment, verified January 19, 1940.

16. Judgment of Appellate Term, made and entered June 28, 1940, affirming judgment and orders of Municipal Court.

17. Order of Municipal Court, made and entered July 3, 1940, making order of Appellate Term the order of Municipal Court, and directing Municipal Court Clerk to enter judgment accordingly.

18. Judgment of Municipal Court, made and entered July 5, 1940.

19. Order of Appellate Term, made and entered August 12, 1940, denying leave to appeal to Appellate Division from judgment of Appellate Term.

20. Order of Appellate Division, made and entered October 9, 1940, denying leave to appeal to Appellate Division from judgment of Appellate Term.

21. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal, all dated October 10, 1940; order allowing appeal to [fol. 125] the Supreme Court of the United States, dated October 11, 1940; statement as to jurisdiction on appeal; citation dated October 11, 1940; statement under Rule 12 of the Rules of the Supreme Court of the United States, dated October 11, 1940; supersedeas bond, dated October 10, 1940; and acknowledgment of service of all these papers on October 11, 1940.

22. Appellee's statement against jurisdiction and motions to dismiss or affirm, and admission of service thereof on October 24, 1940.

23. This praecipe, dated October 31, 1940, and acknowledgment of service thereof.

Said transcript to be prepared as required by law and the Rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 20th day of November, 1940.

Dated: October 31, 1940.

William J. Donovan, Counsel for Appellant.

Service of the above praecipe ~~accepted and~~ acknowledged this 1st day of November, 1940.

Louis J. Vorhaus, Counsel for Appellee.

[fol. 126] In Supreme Court of New York, Appellate Term, First Department

[Title omitted]

Order Directing Filing of Municipal Court Record in the Office of the Clerk of the Supreme Court.—Filed October 21, 1940

It appearing that the Honorable Harlan F. Stone, an Associate Justice of the Supreme Court of the United

States, has allowed an appeal to said Supreme Court from the judgment herein of the Appellate Term of the Supreme Court, First Department, dated the 28th day of June, 1940, and it appearing that said Honorable Harlan F. Stone has directed the Clerk of this Court to prepare and certify the transcript of the record, proceedings and judgment herein and to transmit the same to the Supreme Court of the United States so that said Clerk shall have the same in the Supreme Court of the United States on or before the 20th day of November, 1940.

Now, on reading and filing the annexed affidavit of David Teitelbaum, sworn to the 17th day of October, 1940, it is

On motion of Donovan, Leisure, Newton & Lumbard, attorneys for the defendant-appellant herein,

[fol. 127] Ordered, that the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, be and he hereby is directed to transmit to the clerk of the County of New York as the Clerk of the Supreme Court, New York County, the record, proceedings and judgment of this Court, on appeal hereto from the judgment of said Municipal Court herein, made and entered in said Municipal Court on the 20th day of March 1940, and from the orders made and entered therein on the 19th day of March, 1940, granting the plaintiff's motion for summary judgment and denying the defendant's cross-motion for summary judgment, all now on file in the office of the Clerk of said Municipal Court under file number 8547/1939, for filing with said Clerk of the County of New York, as aforesaid, so that a transcript of said record, proceedings and judgment, together with such other papers now on file with said Clerk of the County of New York, as aforesaid, as may be designated for that purpose, may be prepared and certified by said Clerk of the County of New York, as aforesaid, to the Supreme Court of the United States in accordance with the order of the Honorable Harlan F. Stone, as Associate Justice of the Supreme Court of the United States, dated the 11th day of October, 1940, and

It Is Further Ordered, that said Clerk of the County of New York be and he hereby is directed as Clerk of this [fol. 128] Court to file said record, proceedings and judgment in his office and, in accordance with the aforesaid order of the Honorable Harlan F. Stone, dated the 11th day of October, 1940, to prepare and certify to the Supreme Court of the United States, in accordance with the Statutes

of the United States and the Rules of the Supreme Court of the United States in such cases made and provided, a transcript of so much of the same as may hereafter be designated as provided in said Statutes and Rules, together with any other papers now on file in his office, which may be so designated.

October 21, 1940.

Ent. B. L. Shientag, Justice Appellate Term of the Supreme Court of the State of New York, First Department.

[File endorsement omitted.]

[fol. 129] In Supreme Court of New York, Appellate Term

Affidavit of David Teitelbaum

State of New York,
County of New York, ss:

David Teitelbaum, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Donovan, Leisure, Newton & Lumbard, attorneys for the defendant-appellant herein, and am fully familiar with all the proceedings heretofore had herein.

I make this affidavit in application for an order directing the Clerk of the Municipal Court, City of New York, Borough of Manhattan, Ninth District, to file the record, proceedings and judgment of this Court in this action with the Clerk of the County of New York, so that certain portions thereof may be certified by the Clerk of the County of New York to the Supreme Court of the United States, pursuant to an order, hereinafter described, allowing an appeal to that Court.

This action was commenced in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, by the service of a summons and complaint on or about the 20th day of July, 1939. On the filing of said summons and complaint with the Clerk of said Municipal Court, the action was given file number 8547/1939 by said Clerk.

[fol. 130] On or about the 19th day of March, 1940 two orders in the action were entered in said Municipal Court, one granting a motion by the plaintiff for summary judg-

ment and the other denying the defendant's cross-motion for summary judgment. Judgment against the defendant on the plaintiff's motion was entered in the office of the Clerk of said Municipal Court on or about the 20th day of March, 1940.

The defendant-appellant duly appealed to this Court from the judgment and orders entered in the Municipal Court, as aforesaid and said appeal duly came on to be heard by this Court, and on the 28th day of June, 1940 a judgment of this Court was made and entered affirming the judgment and orders appealed from.

Defendant-appellant thereupon duly applied to this Court for leave to appeal from the judgment of affirmance aforesaid to the Appellate Division of the Supreme Court, First Department. Said motion for leave to take such further appeal was denied by this Court on or about the 12th day of August, 1940. Following such denial, the defendant-appellant duly applied to said Appellate Division for such leave but the Appellate Division denied the motion on or about the 9th day of October, 1940.

Defendant-appellant, having thus exhausted its remedies by way of a review of the Municipal Court judgment and [fol. 131] orders in the Courts of this State, duly submitted a petition to the Honorable Harlan F. Stone, an Associate Justice of the Supreme Court of the United States, on October 11, 1940, for the allowance by said Supreme Court of an appeal from the aforesaid judgment of affirmance of this Court to said Supreme Court and upon said petition said Honorable Harlan F. Stone allowed said appeal.

Attached hereto and made a part hereof is a copy of the order of said Honorable Harlan F. Stone allowing the appeal from the judgment of this Court to the Supreme Court of the United States. All of the papers on the allowance of the appeal will be requisitioned for examination by this Court on this application.

The order allowing the appeal, among other things, directs the Clerk of this Court to prepare and certify a transcript of the record, proceedings and judgment of this Court in the action and to transmit them to the Supreme Court of the United States so that said Court shall have them within forty days of said 11th day of October, 1940, i. e. on or about the 20th day of November, 1940. I am informed and believe, however, that, pursuant to Section 163

of the Municipal Court Code, on the rendering of the aforesaid judgment of this Court, the Clerk hereof remitted said judgment to the Municipal Court of the City of New York, [fol. 132] Borough of Manhattan, Ninth District and returned to the Clerk of said Municipal Court all the papers on which the appeal to this Court was heard including the proceedings of this Court on the appeal hereto. I have been informed that in order that the transcript of the record, proceedings and judgment of this Court on the appeal hereto may be prepared and certified by the proper Clerk on behalf of this Court to the Supreme Court of the United States, in accordance with the said order of Honorable Harlan F. Stone, said record, proceedings and judgment should be filed in the office of the Clerk of the County of New York as Clerk of the Supreme Court, New York County, so that the latter Clerk may make the certification.

Under Rule 10 of the General Rules of the Supreme Court of the United States the Clerk of the Court from which the appeal is taken is required to certify not the entire record but only such portions thereof as shall be designated for incorporation in such transcript.

No previous or other application has been made for the relief applied for herein.

Wherefore, it is respectfully prayed that an order be made herein directing the Clerk of the Municipal Court, Borough of Manhattan, Ninth District, to transmit to the [fol. 133] Clerk of the County of New York, as aforesaid, the record, proceedings and judgment of this Court on appeal hereto from the aforesaid judgment and order of said Municipal Court, so that said Clerk of the County of New York may prepare and certify a transcript of said record, proceedings and judgment to said Supreme Court of the United States on the appeal to that Court; and, directing the Clerk of the County of New York as Clerk of this Court to prepare and certify to the Supreme Court of the United States the transcript of said record, proceedings and judgment.

David Teitelbaum.

Sworn to before me this 17th day of October, 1940.
John A. Morhous, Notary Public. (Notarial Seal.)

Notary Public, Nassau Co. No. 2066.
N. Y. Co. Clk's. No. 848, Reg. No. 2M524.
Commission expires March 30, 1942.

[fol. 134] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Appellate Term of the Supreme Court of the State of New York, First Department, on the 28th day of June, 1940, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here Ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the Appellate Term of the Supreme Court of [fol. 135] the State of New York, First Department, in the above entitled cause, as provided by law, and it is further Ordered that the clerk of the Appellate Term of the Supreme Court of the State of New York, First Department, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

It is Further Ordered, that said Appellant shall file a bond in the penal sum of $1,000.00, with good and sufficient surety, that he shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good.

It is Further Ordered that upon giving the above-mentioned security, this appeal shall operate as a supersedeas, and that execution and other proceedings under the judgment appealed from shall be stayed, pending this appeal.

Dated: October 11, 1940.

Harlan F. Stone (Sgd.), Associate Justice of the Supreme Court of the United States.

[fol. 136] Supreme Court of the United States

[Title omitted]

Designation of Additional Portions of Record to be Included in Transcript

To the Clerk of the County of New York:

In making up the transcript of record to be filed in the Supreme Court of the United States in the above entitled cause, you will please include in such transcript of record the following additional portions of the record not requested by the appellant, viz:

1. Paragraphs Third, Fourth and Fifth of the Answer, verified July 31st, 1939.

2. That portion of the opinion of Whalen, J., in the Municipal Court, beginning with the second full paragraph on page 293 of the original papers on appeal to the Appel-
[fol. 137] late Term, and ending with the fourth line on page 301 of said papers

3. Order of Appellate Term, made and entered October 21st, 1940, directing the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, to transmit to the Clerk of the County of New York the record, proceedings and judgment of said Appellate Term on appeal thereto from the judgment of said Municipal Court herein, made and entered in said Municipal Court on the 20th day of March, 1940, and from the orders made and entered therein on the 19th day of March, 1940.

4. Affidavit of David Teitelbaum, sworn to the 17th day of October, 1940, recited in said order of the Appellate Term, made and entered on the 21st day of October, 1940, excluding the material beginning with the words, "The pertinent provisions of said Rule 10 are", on page 3 of said affidavit, and ending with the end of the quotation from said Rule on page 4.

5. This designation of additional portions of the record, desired to be included, dated the 8th of November 1940, and acknowledgment of service thereof.

Dated: November 8th, 1940.

Louis J. Vorhaus, Counsel for Appellee.

[fol. 138] Service upon the undersigned of the above designation is hereby acknowledged this 8th day of November, 1940.

William J. Donovan, Counsel for Appellant.

[fol. 139] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 140] Supreme Court of the United States

Statement of Points to be Relied upon and Designation of Parts of the Record Unnecessary for the Consideration Thereof—Filed November 28, 1940

Comes now the appellant in the above entitled cause and informs the Court that it will rely upon the following points:

1. The Court below erred in holding that Section 143 of the Railroad Law of the State of New York, as applied to the facts of this case, is not repugnant to Section 20a of the Federal Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

2. The Court below erred in holding that Section 143 of the New York Railroad Law, as applied to the facts of this case is not in conflict with Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

3. The Court below erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies.

[fol. 140a] 4. The Court below erred in holding that Section 20a of the Interstate Commerce Act (U. S. C. Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a.

And the appellant further states that the following parts of the record are unnecessary to a consideration of the points upon which it relies and which are set forth above:

1. Portion of answer setting forth first complete and separate defense, appearing on page 9a of the record.

2. Portion of opinion of Whalen, J., beginning with the words "Defendant interposes two defenses", on page 45 of the record, and ending with the sentence "Defendant has cited no case which pushes the doctrine of ultra vires to the extent urged in this case", on page 53 of the record; and beginning and ending with the same words on pages 92 and 100 of the record, respectively.

3. Order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing on pages 126-128 of the record.

4. Affidavit of David Teitelbaum in application for order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing at pages 129-133 of the record.

William J. Donovan, Counsel for Appellant.

Service accepted this 25 day of November, 1940.
Louis J. Vorhaus, Counsel for Appellee.

[fol. 140b] [File endorsement omitted.]

[fol. 141] Supreme Court of the United States

Designation by Appellee of Additional Parts of Record to be Printed—Filed December 3, 1940

Now comes the Appellee and designates the following additional parts of the record which she thinks material:

1. Portion of answer, setting forth first complete and separate defense, appearing on page 9a of the record.

2. Portion of opinion of Whalen, J., beginning with the words, "Defendant interposes two defenses", on page 45 of the record, and ending with the sentence, "Defendant has cited no case which pushes the doctrine of ultra vires to

the extent urged in this case", on page 53 of the record; and beginning and ending with the same words on pages 92 and 100 of the record, respectively.

3. Order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing on pages 126-128 of the record.

[fols. 142-143] 4. Affidavit of David Teitelbaum in application for order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing at pages 129-133 of the record.

Dated: December 2nd, 1940.

Louis J. Vorhaus, Counsel for Appellee.

Service accepted this 2nd day of December, 1940.

William J. Donovan, Counsel for Appellant.

[fol. 144] [File endorsement omitted.]

Endorsed on Cover: File No. 44,935, New York, Appellate Term, Supreme Court, Term No. 586. New York, Chicago & St. Louis Railroad Company, Appellant, vs. Dorothea T. Frank. Filed November 20, 1940. Term No. 586 O. T. 1940.